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IN THE

# SUPREME COURT OF THE UNITED STATES

ALLEN E. NORTHERN, JR.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 1 |
| Statement of Jurisdiction | 1 |
| Question Presented | 2 |
| Statute Involved | 2 |
| Statement of the Case | 2 |
| Argument and Reasons for Granting the Writ | 4 |
| Conclusion | 10 |

## STATUTES


| | Page |
|---|---|
| 26 U.S.C. §7201 | 2, 3 |
| 28 U.S.C. §1254(1) | 2 |


## TABLE OF CASES


| | |
|---|---|
| *Bird v. United States*<br>180 U.S. 356 | 5, 9 |
| *Boyd v. United States*<br>142 U.S. 450 | 5, 9 |
| *Boyer v. United States*<br>132 F.2d 12 (D.C. Cir.) | 5 |
| *Grant v. United States*<br>255 F.2d 341 (6th Cir.) | 6 |
| *Hubby v. United States*<br>150 F.2d 165 (5th Cir.) | 5, 7, 8 |
| *Lovely v. United States*<br>169 F.2d 386, 389 (4th Cir.) | 6 |
| *Roe v. United States*<br>316 F.2d 617, 621 (5th Cir. 1963) | 7 |
| *Waller v. United States*<br>177 F.2d 171 (9th Cir. 1949) | 7 |
| *Witters v. United States*<br>196 F.2d 837 (D.C. Cir.) | 5, 7, 8 |


## MISCELLANEOUS


| | |
|---|---|
| 11 Wigmore, Evidence §316 | 7 |

**IN THE SUPREME COURT OF THE UNITED STATES**

**No.**

ALLEN E. NORTHERN, JR.,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**To the Honorable, the Chief Justice, and the Associate Justices of The Supreme Court of the United States:**

The petitioner, Allen E. Northern, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in Cause No. 15,469 of that Court on March 27, 1964.

**OPINION BELOW**

The opinion of the Court of Appeals for the Sixth Circuit has not been generally reported, but a copy thereof is appended to this petition.

**STATEMENT OF JURISDICTION**

The United States District Court for the Middle District of Tennessee, Nashville Division, entered a judgment of conviction on February 15, 1963, against the petitioner on a charge of willful evasion of pay-

ment of income taxes for the year 1956. The United States Court of Appeals affirmed on March 27, 1964.

Jurisdiction to entertain this petition is conferred on the Supreme Court of the United States by 28 U.S.C. §1254(1).

## QUESTION PRESENTED

In a prosecution for fraudulent underpayment of Federal income taxes for three consecutive years, is evidence admissible that the taxpayer concealed income in a subsequent year by personally falsifying records, on the ground that this tends to show that he authorized prior similar conduct by his employee during the prosecution period?

## STATUTE INVOLVED

26 U.S.C. §7201. Attempt to evade or defeat tax.

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, 9:45 a.m., E.D.T., c 736, 68A Stat. 851.)

## STATEMENT OF THE CASE

Petitioner (hereinafter called "defendant") is in the amusement machine business, maintaining coin-operated music and pinball machines in various locations in the Nashville area. He was convicted in the District Court of the Middle District of Tennessee

on one of three counts charging willful evasion of payment of income taxes. (26 U.S.C. §7201) Defendant was indicted in separate counts for the years 1954, 1955 and 1956 (5a).[1] The first trial resulted in a mistrial when the jury could not agree. At the second trial, defendant was acquitted by the jury for the years 1954 and 1955 but convicted for the year 1956 (465a).

The indictments charge specifically that defendant filed on behalf of himself and his wife false and fradulent income tax returns for each year in violation of section 7201 of the Internal Revenue Code, alleging particular amounts of actual and stated income and taxes for each year (5a-7a). The Government's proof was based upon the net worth method of establishing tax evasion. The beginning point for the Government's computation was January 1, 1954, from which the Government showed additions to net worth during the years 1954, 1955 and 1956, and thereby attempted for each year to prove substantial unreported income (463a-464a).

One of the questions presented to this Court of Appeals, and the sole question presented by this petition relates to a ruling by the District Court admitting in evidence certain testimony concerning the defendant's activities in 1957. This ruling was made in the following context. Robert Green, an employee who made collections for the defendant, testified that beginning late in 1955 and up until May of 1956 he falsified collection tickets for machines at Estes' Drive-In, by showing them to be only one-half the amount actually collected (485a). Green did not testify that

[1] References to the record in the Appendix to the Brief for Defendant-Appellant in the Court of Appeals will be designated by a page number followed by "a".

this was done at the direction of defendant or with his consent. However, Mr. Estes testified that he had an "agreement" with defendant under which this was done (469a). On cross-examination Estes could give neither the time nor place when such agreement was made, nor could he furnish any details (470a, 471a, 476a). On redirect examination, over defendant's strenuous objection, Estes was allowed to testify that after Mr. Northern's machines had been removed from his place in May of 1956 and relocated there in 1957, Mr. Northern personally made collections and falsified the records showing lesser collection amounts by putting, "any amount he wanted to" on the collection tickets, not necessarily one-half as Green had always done (480a, 482a). The Court overruled defendant's objection and admitted the testimony, with the instruction that the jury could consider it as tending to show "the truth of the statements previously made as to the agreements that were in existence in the years 1954, 1955, or 1956" (482a).

## ARGUMENT AND REASONS FOR GRANTING THE WRIT

**In a prosecution for fraudulent underpayment of Federal income taxes for three consecutive years, is evidence admissible that the taxpayer concealed income in a subsequent year by personally falsifying records, on the ground that this tends to show that he authorized prior similar conduct by his employee during the prosecution period?**

**The Court of Appeals answered this question in the affirmative. Defendant contends that it should have been answered in the negative.**

By its ruling and instruction, the District Court

permitted the jury to treat testimony concerning defendant's wrongful conduct in 1957 as evidence that he had participated in similar wrongful conduct through his agent Green, in 1956. The Court's instruction purports to limit the effect of this testimony, but it does not in fact do so. The jury was instructed that the testimony could be considered "only" insofar as it tended to show the truth of earlier testimony concerning the income-concealing agreements allegedly made by the defendant in 1956. Thus, from testimony that defendant concealed income in 1957, the jury was permitted to directly infer that he participated in the concealment of income in 1956.

It is fundamental that a defendant may not be convicted of one offense upon the basis of evidence that he committed other similar offenses upon other occasions. *Bird v. United States*, 180 U. S. 356, 1900; *Boyd v. United States*, 142 U. S. 450, 1891; *Witters v. United States*, 106 F.2d 837 (D.C. Cir., 1939); *Boyer v. United States*, 132 F.2d 12 (D.C. Cir., 1942); *Hibby v. United States*, 150 F.2d 165 (5 Cir., 1945); and *Lovely v. United States*, 169 F.2d 386 (4 Cir. 1948). This principle is not a mere technical rule of evidence, but is one of the most basic protections afforded criminal defendants. It has been described by the Fourth Circuit Court of Appeals in the following terms:

> " 'The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.' 1 Bishop, New Crim. Proc. §1120. This rule, so universally recognized and so firmly established in all English-speaking lands is rooted in that jealous regard for the liberty of the individual which has distinguished our juris-

> prudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto."

*Lovely v. United States*, 169 F.2d 386, 389 (4 Cir., 1948).

In the present case, the Court of Appeals justified the admission of the testimony concerning Northern's 1957 activities on the ground that it "tended to prove knowledge and authorization by Northern of the concealments which took place in the tax years in question". Clearly the testimony was not admissible for the sole purpose of proving "authorization" of the concealments, since evidence of "authorization" would be evidence of participation in the crime charged—i.e., tax evasion through fraudulent concealment of income. Nor is the testimony admissible for the purpose of proving "knowledge". Where knowledge is an element of the offense charged, the commission of prior offenses by the defendant may be admissible for the limited purpose of proving such knowledge. *Grant v. United States*, 255 F.2d 341 (6 Cir., 1958). This exception does not, however, apply to the present case, since the fact at issue was not Northern's knowledge of the prior transactions, as a constituent element of the offense charged, but his participation in these transactions.

Moreover, knowledge at a prior time cannot prop-

erly be proved by evidence of subsequent conduct. *Waller v. United States*, 177 F.2d 171 (9th Cir. 1949); *Hubby v. United States*, supra; and *Witters v. United States*, supra. See also *Roe v. United States*, 316 F.2d 617, 621 (5th Cir. 1963). Wigmore explains the reason for this rule, and the reason for distinguishing between knowledge and intent in this regard, as follows:

> "[T]he subsequent uttering [of a fraudulent instrument] could of course result in no warning which should show Knowledge at the anterior time charged; while, in evidencing Intent, it is the repetition of instances that tends to negative innocence in particular instances, and thus it is immaterial whether the instances are found occurring before or after the act charged."
>
> II Wigmore, Evidence §316.

This distinction has been recognized and followed by at least two of the Circuit Courts:

> "Where other acts are offered as evidentiary of intent under the rule heretofore mentioned, it matters not whether they are subsequent or prior in time. Regina v. May, 1845, 1 Cox Cr. 236; Shreve v. United States, 9 Cir. 1939, 103 F.2d 796. Proof of knowledge, on the other hand, materially differs, requiring inherently that the other acts be prior in time."
>
> *Waller v. United States*, 177 F.2d 171, 176 (9th Cir. 1949)

> "[W]hile one may have an intention to do something in the future, one cannot have knowledge of a fact at a certain time through some happening or occurrence that may take place in the future. . . . The opinion of the court is that upon the question of knowledge the cases, properly interpreted, make evidence of other offenses admissible only when it relates to prior offenses or to situations in which the offenses occurred both

> prior and subsequent to the offense charged in the indictment, and that consequently, the admission of the evidence of subsequent offenses for the purpose of showing knowledge was fatally prejudicial and necessitates a reversal of the judgment."
>
> *Witters v. United States*, 106 F.2d 837, 840 (D.C. Cir., 1939)

Counsel has been unable to find any case, other than the present case, which holds that subsequent conduct is admissible for the purpose of proving prior knowledge.

Finally, the admission of this testimony cannot be justified on the theory that it tended to show the defendant's "knowledge," since the court did not so limit it in its instruction to the jury. The jury was instructed that they could treat the testimony as evidence, not of defendant's knowledge of the prior agreements, but of his participation in them. This was clearly improper. If there was a logical, proper purpose for admitting this testimony, the defendant was entitled to instructions limiting it to that purpose. *Hubby v. United States*, 150 F.2d 165 (5th Cir. 1945).

On the basis of the above authorities, petitioner respectfully submits that certiorari should be granted in this case, for the following reasons:

(1) The error asserted by petitioner affected his basic procedural rights. It is not improbable that the defendant was convicted of the offense with which he was charged solely because of testimony concerning an entirely separate offense, which was not charged in the indictment. It is submitted that the admission of such testimony was a deviation from established procedural principles of sufficient magnitude to merit the attention of this Honorable Court.

(2) This case focuses a problem which is recurrent in tax fraud litigation and which urgently needs emphasis and clarification. Because taxpayers engage in substantially similar conduct from year to year in recording and reporting their income, and because of the importance of the mental element in tax fraud prosecutions, the admissibility of evidence of "other offenses" is a frequent issue in such cases. The Circuit Courts have not, in general, given this issue the attention it deserves. The opinion of the Sixth Circuit Court of Appeals in the present case is typical in this regard. In disposing of the "other offense" issue, the Court merely stated that the testimony concerning the 1957 concealment was admissible for the purpose of proving "knowledge and authorization." The Court fails to note that knowledge, as a constituent element of the offense charged, is not at issue. It also fails to note that the District Court's instruction did not limit the testimony to the issue of knowledge. Moreover, the two cases cited by the Court in support of its holding both involved testimony concerning prior, rather than subsequent conduct, and in both cases the testimony was relevant to a mental element of the offense charged.

This Honorable Court has previously taken a strong position against the admission of evidence of other conduct or offenses in cases involving crimes of physical violence. *Bird v. United States*, supra and *Boyd v. United States*, supra. It is submitted that the principles of these leading cases should be reaffirmed within the context of tax fraud litigation, in which the problem is far more recurrent, and the danger of abuse, through loose reliance upon the "intent, knowledge, or design" exceptions, is far greater.

## CONCLUSION

The petitioner believes that on the basis of the above stated reasons, he should be granted a review of his conviction on writ of certiorari, and the said conviction should be reversed and the petitioner discharged, or in the alternative, granted a new trial.

Respectfully submitted,

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